Dance of Courts

Maximilian Steinbeis 2021-05-21T20:02:36

Since yesterday, the German Federal Constitutional Court finds itself in an unusual role: a member state court has referred questions to it about the correct interpretation of the federal law. It is the Constitutional Court of the *Land* of Thuringia, which in this way turns Karlsruhe into a kind of *Bundes*-ECJ.

The questions referred to the Karlsruhe Court are among the most hotly contested in German constitutional law of these pandemic times: it is about the Federal Infection Protection Act and the question of what the parliamentary legislator has to regulate herself and what she may delegate to the government. For almost the entire year 2020, until the act was finally amended at the end of November, the (federal) legislature had tried to make do with a blanket authorisation of (state) governments to issue ordinances regulating what they considered appropriate in terms of “necessary protective measures” to ward off the pandemic danger, including the according encroachments on fundamental rights.

On this basis, the Thuringian government had issued an ordinance at the end of October 2020, the compatibility of which with the Thuringian constitution must now be reviewed by the state constitutional court at the request of the far-right AfD. A 9:3 majority considers the ordinance and its statutory basis to be “just about” acceptable as a transitional measure, as the amendment of the authorising act was already within reach at the time. However, according to the Thuringian constitutional judges, their colleagues over in the neighbouring land of Saxony-Anhalt had already come to the opposite conclusion with respect to their corresponding ordinance, which they had declared partially unconstitutional. If a *Länder* constitutional court wishes to diverge from another in its interpretation of the *Grundgesetz*, it must obtain a decision from the Federal Constitutional Court in accordance with Article 100 (3) of the federal constitution.

Such so-called *Divergenzvorlagen* are extremely rare. I must confess, I wasn’t aware that such a thing even existed until yesterday. This fits in with the marginal existence that the *Länder* constitutional courts, along with the *Länder* constitutions, have generally led since the 1950s. Usually, hardly anyone notices their existence and their work at all. I have just found out that the Constitutional Court of Saxony-Anhalt has its seat in the town of Dessau-Roßlau. You never stop learning.

The constitutional law of the *Länder* is to the Federal Republic what the *Grundgesetz* could become to the European Union, at least according to the nightmare that has been disturbing the Second Senate of the Federal Constitutional Court’s sleep time and again for the past quarter of a century: academically neglected, practically insignificant, withering away in the shadow of the superior legal system that is fertilised and watered by a powerful and self-confident court and sends its normative vines through almost all areas of life, society and politics with its many-branched fundamental rights jurisprudence, robbing everything growing below of light and air.

Might this be starting to change now? Is something like a federal *Verfassungsgerichtsverbund* emerging? Are the state constitutional courts beginning to discover that referrals to Karlsruhe might raise their status, turn them into interlocutors and cue-givers for the further development of constitutional law in the European multi-level system? Might other state constitutional courts perhaps choose to defiantly wave the flag of their constitutional identity and fend off Karlsruhe encroachments? With its verdict of unconstitutionality, the Saxony-Anhalt court had itself diverged from a previous ruling from Thuringia and, according to the logic of its Thuringian colleagues, would thus possibly itself have been obliged to refer questions to Karlsruhe accordingly. But it didn't. A statement, perhaps?

Effective legal protection

As far as the ECJ is concerned, it has more urgent things to do right now than waltzing with the German Constitutional Court in mutual *Verfassungsgerichtsverbund* embrace. The Polish "Constitutional Tribunal" (its blatantly illegal composition forbids its mention under its erstwhile name without quotation marks), as far as the transformation of the Polish judiciary into an authoritarian tool of the PiS party is concerned, is setting out to defect from its allegiance to EU law and the European Court of Justice altogether, allegedly in the name of Polish constitutional identity.

In one of the cases currently pending before the ECJ, Advocate General Bobek presented his opinion yesterday: A criminal chamber at the District Court in Warsaw had referred questions to the ECJ about the fact that in Poland the public prosecutor's office is empowered to assign judges to a higher court and to remove them again without being accountable to anyone for the criteria nor for the timing at which it chooses to do so. The Chief Prosecutor is, of course, the same person that holds the office of Minister of Justice, Zbigniew Ziobro, the dark lord of PiS legal and judicial policy since 2015.

Promotionsstelle (E 13, 100%, drei Jahre mit Verlängerungsmöglichkeit) an der **Professur für Europarecht, Prof. Dr. Anna Katharina Mangold**, LL.M. (Cambridge), Europa-Universität Flensburg.

Forschungsschwerpunkte an der Professur sind neben allen Fragen des deutschen öffentlichen Rechts und Europarechts insbesondere Antidiskriminierungsrecht, rechtliche Regelungen zur Corona-Pandemie, öffentliche Rechtsgeschichte und interdisziplinäre Rechtsforschung. Bewerbungsfrist ist der 4.6.2021.

Mehr Informationen gibt es hier.

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Is this a problem that can be fixed at all under European law? Article 19 TEU requires “effective legal protection in the fields covered by Union law”. Judicial policy is reserved to the member states, but insofar as courts also rule on Union law, their independence is an EU issue as well. That, in fact, applies pretty much to all courts in Europe. Does this mean that every single fair trial and lawful judge issue anywhere opens an extraordinary appeal path to Luxembourg? What kind of normative vines could sprout from such a seed and eventually overgrow the sovereignty of the member states to shape their judiciary according to their own ideas?

Not to worry, says Advocate General Bobek: Article 19 TEU grants an “extraordinary remedy for extraordinary cases”. As far as this norm is concerned, whether the judiciary in a member state is independent or not is not a case-to-case matter. It is “structural”. And the EU as a community of law as a whole depends on it. “In a system such as that of the European Union, where the law is the main vehicle for achieving integration, the existence of an independent judicial system (both centrally and nationally), capable of ensuring the correct application of that law, is of

paramount importance. Quite simply, without an independent judiciary, there would no longer be a genuine legal system. If there is no 'law', there can hardly be more integration. The aspiration of creating 'an ever closer union among the peoples of Europe' is destined to collapse if legal black holes begin to appear on the judicial map of Europe."

Article 19 TEU is not about judicial micromanagement, but about "whether a Member State's judicial system complies with the principle of the rule of law, one of the Union's founding values, which is also to be found in Article 2 TEU." Only when the problems assume such a gravity and/or such a systemic nature that they can no longer be dealt with in the internal legal system does the way to Luxembourg open up.

With this, the Advocate General, it seems to me, ends up not too far away from the proposal that Armin von Bogdandy and his Heidelberg research group developed almost a decade ago in an expert opinion for the German Foreign Office and put up for discussion in a legendary online symposium here on Verfassungsblog: a kind of reversed *Solange* reservation of the ECJ vis-à-vis the member states, as far as fundamental judicial procedural rights are concerned. As long as (*solange*) these rights are respected on the whole, failures in individual cases remain none of Luxembourg's business. But if the whole starts to slip, then the ECJ is in charge and may and will do what is necessary to save the community of law from internal disintegration.

Which, of course, is clearly the case with Poland.

(Meanwhile, the Polish Minister of Education, Przemys#aw Czarnek, announces that in future Polish students will learn in school that the European Union is an "illegal entity"…).

The week on Verfassungsblog

Speaking of *Verfassungsgerichtsverbund*: last year, the Federal Constitutional Court, with its **Weiss ruling**, accused the ECJ and the European Central Bank of an ultra vires act, a huge act of escalation in the Karlsruhe/Luxembourg conflict. This week, however, the Second Senate explained that its expectations of conduct in conformity with the Treaty were in fact a lot easier to fulfil than many would have thought. MARTIN NETTESHEIM analyses what this implies.

A constitutional sensation took place in **Kenya** last week. In a ruling of over 300 pages, the country's High Court adopted the so-called basic structure doctrine for Kenyan constitutional law. According to this doctrine, the core content of the Kenyan Constitution cannot be changed by the ordinary legislator, but only by the people as the primary constituent power. YANIV ROZNAI explains why the ruling is a milestone and will have far-reaching consequences beyond Kenya.

In **Scotland**, the elections have produced a majority in parliament in favour of independence. KELLY SHUTTLEWORTH analyses how Scotland could find its way back into the EU in this event.

Almost four years ago, the Catalan government tried to force independence from **Spain** with a unilateral “referendum”. Many of those responsible were sentenced to draconian prison terms by the Spanish judiciary, and Spain’s Constitutional Court gave its blessing last month. JOAQUÍN URÍAS analyses how this may affect freedom of assembly.

European asylum law is plagued by several structural problems. It relies on highly complicated procedures laid down in lengthy regulations, many of which do not function in legal practice at Europe’s external borders. DANIEL THYM explains the human rights limits for **pushbacks**.

In **Brazil**, Attorney General Augusto Aras has filed a lawsuit against law professor Conrado Hübner Mendes after the academic criticised him in a newspaper article. EMILIO PELUSO NEDER MEYER and THOMAS DA ROSA DE BUSTAMANTE see this as a sign of how much academic freedom is under attack in Brazil.

Recently, **lèse-majesté laws** have been used as a weapon against the opposition in Turkey, Spain and Poland. Their very existence threatens the right to freedom of expression. AYTEKIN KAAN KURTUL thinks modern democracies should urgently abolish this relic of a bygone era.

After a long wait, the British government has unveiled its ‘**Online Safety Bill**‘, which is supposed to usher in a new era of accountability for platform operators. The only problem, according to EDINA HARBINJA, is that the bill in its current form potentially violates human rights and may even encourage private censorship.

Britain has recently declared itself the “Nation of Animal Lovers”. The government has presented an action plan for the protection of animals, which includes recognising **animals as sentient beings**. If one believes the accompanying government rhetoric, this has only become possible because of Brexit. KATHARINA BRAUN explains that things are not quite like that and that the government must now back up its words with action if it is serious about animal welfare.

In **China**, the government is taking stronger action against giants of the digital economy whose market behaviour is monopolistic or anti-competitive and thus harms national innovation strategies. SHUNYU CHI examines the record $2.75 billion fine against Alibaba, a powerhouse of the Chinese economy, in this context.

The debate on the German Federal Constitutional Court’s **climate decision** continues: It has brought the issue of intergenerational justice back into the spotlight of political and legal discussions. LUKAS MÄRTIN and CARL MÜHLBACH argue that a departure from budgetary austerity (*Schwarze Null*) must now follow. Future freedom can only be had with a massive expansion of investment. ARMIN STEINBACH takes a more critical look at the verdict, fearing that euphoria could soon turn into disillusionment: At least from a global perspective, the Federal

Constitutional Court is paying for its legal innovations with economic naivety, because the decision now gives other states an incentive to consume even more CO2. MARTEN BREUER, on the other hand, ponders what unforeseeable consequences the decision could have for the dogmatics of fundamental rights of freedom.

German parties, like the FDP recently, are holding their **party conventions online** in the pandemic. Is this a token of digital progress? At any rate, according to ALEXANDER HOBUSCH, it is a step backwards as far as internal democracy of parties is concerned.

In **India**, a conflict has arisen between Delhi and the federal level, with the preliminary result of Delhi's democratically legitimised self-government being considerably curtailed. EKLAVYYA VASUDEV explains the background to the conflict, arguing that a methodologically flawed Supreme Court ruling sowed the seeds for Delhi's disempowerment.

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So much for this week. Please don't forget: We remain dependent on your support!

All the best,

Max Steinbeis
